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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ALEXANDER W. et al.,

Persons Coming Under  
The Juvenile Court Law,

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

CATRINA W., LARRY L.,

Defendants and Respondents.

D049702

(Super. Ct. No. SJ11469A/B)

APPEAL from a judgment of the Superior Court of San Diego County, Peter E. Riddle, Judge. Affirmed.

Mother Catrina W. and stepfather Larry L. appeal following the termination of their parental rights over Alexander W. and Katherine W. Catrina contends the juvenile court erred by declining to apply the beneficial relationship exception to termination

(Welf. & Inst. Code, § 366.26, subd. (c)(1)(A))<sup>1</sup> and by failing to order a permanent plan of long-term foster care or guardianship. Larry contends the court erred by denying his section 388 modification petition which sought presumed father status and that cumulative errors require reversal of the order denying his petition. We affirm.

## BACKGROUND

In May 2005, when Alexander was three years old and Katherine was ten months old, the San Diego County Health and Human Services Agency (the Agency) filed dependency petitions. Their home was extremely filthy and unsanitary, with trash cans overflowing, dirty dishes in the sink and on the counters, dog feces and debris on the patio, and methamphetamine residue, marijuana, and drug paraphernalia within the children's reach. Catrina admitted using methamphetamine and Larry was arrested for possessing narcotics.

The children were detained in Polinsky Children's Center. After two weeks, they were detained in a foster home where they were later placed. In March 2006, they were moved to a concurrent placement foster/adoptive home. On October 20, the court denied Larry's section 388 petition and terminated parental rights.

## LARRY'S SECTION 388 PETITION

The dependency petitions alleged the identities of the children's fathers were unknown. At the outset of the case, Catrina said that Larry was not the children's father. Larry agreed. At the May 10, 2005 detention hearing, the court received Catrina's

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

paternity questionnaires. They stated that Noel O. was Alexander's father, Jaime D. was Katherine's father, and Catrina had married Larry in January 2005, more than two years after Alexander's birth and more than six months after Katherine's birth. The court added Noel's and Jaime's names to the petitions as alleged fathers.

A few days before the petitions were filed, Larry was arrested for possessing methamphetamine and being in violation of parole. On a form dated August 15, 2005, Larry referred to Alexander and Katherine as "my child(ren)" and requested appointed counsel. On September 6, the court appointed counsel for him. On September 27, the court received a letter from Larry dated September 7, requesting legal representation and presumed father status, and stating he wished to be produced from Richard J. Donovan Correctional Facility (Donovan) for the next hearing. The letter expressed his love for his step children, claimed he was the only father they knew, and stated he was willing to support them financially. Larry said his release date was January 10, 2006. On October 6, Larry's appointed counsel told the court that he "discovered late" that he had been appointed,<sup>2</sup> he had requested the file on September 30, and he had not contacted Larry. The court told counsel to put the matter on calendar when there was an issue to be addressed.

At the December 1, 2005 six-month review hearing, Larry's counsel requested a continuance because he had neglected to request that Larry be produced from prison. The court denied the request, noting that counsel had ample time before the January 2006

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<sup>2</sup> Counsel was not present when the court appointed him.

trial. At counsel's request, the court set the pretrial conference for January 12, when counsel said Larry would be released from custody. The court found, based on a paternity test, that Noel was not Alexander's father and struck Noel's name from the petition.

On January 12, 2006, Larry appeared in court with his attorney. Counsel said that Larry wanted presumed father status pursuant to Family Code section 7611, subdivision (d).<sup>3</sup> The court deferred consideration of the issue until the January 19 trial. Jaime's counsel told the court that he had received a letter from Jaime, saying he was not the father and did not wish to participate in the proceedings. The court relieved Jaime's counsel.

On January 19, 2006, the court received Larry's paternity questionnaires. In the questionnaires, Larry claimed he married Catrina in 2005, and was married to and living with her when the children were born, yet admitted that Alexander was born in 2002 and Katherine was born in 2004. The questionnaires also said the children had lived with Larry for a year. The court denied Larry's request to be ordered into the Substance Abuse

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<sup>3</sup> Larry's counsel later claimed Larry was also entitled to presumed father status pursuant to Family Code section 7611, subdivision (c). Clearly, that subdivision does not apply in this case, and Larry does not now contend that it does. Family Code section 7611 states: "A man is presumed to be the natural father of a child if he meets the conditions . . . in any of the following subdivisions: [¶] . . . [¶] (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) With his consent, he is named as the child's father on the child's birth certificate. (2) He is obligated to support the child under a written voluntary promise or by court order. (d) He receives the child into his home and openly holds out the child as his natural child."

Recovery Management System (SARMS), noting he was an alleged father. It continued the January 19, 2006 hearing to March 6 its own motion, due to its busy trial calendar. It ordered Larry, who was present in court, to return on March 6.

Larry did not appear in court on March 6, 2006. His attorney requested a continuance, saying Larry was in Donovan. The court denied the request and set a section 366.26 hearing for July 5, 2006. On April 5, the court received another letter from Larry. It stated that he was still in Donovan and wanted to be produced for the next hearing. He gave his release date as "late September."

The section 366.26 hearing was continued several times, eventually to October 18, 2006. On October 17, Larry filed his section 388 petition seeking presumed father status (Fam. Code, § 7611, subd. (d)) and a judgment of paternity. The petition requested modification of orders made on "various" dates. In the section of the petition calling for a list of orders to be modified, the petition stated "[Larry] has been identified by the court as an 'alleged father'. On [October 16], [the Agency], through [its] counsel, asserted that [Larry] is the children's stepfather and has no standing in their cases." As changed circumstances, the petition alleged "The children lived with [Larry] from April 2004 to May 5, 2005, when they were removed from their family residence. During that time to present, [Larry] has held himself out as their father, provided them with food, clothing and shelter until May 2005 and has subsequently maintained a relationship with them." The petition stated the proposed modification was in the children's best interests for the following reasons: "[Larry] has been the only father the children have known. Alexander's father is unknown. [K]atherine's alleged father denies paternity. They call

him '[D]addy'. They looked to him to meet their physical and emotional needs.

Alexander was 2 when he began living with [Larry]. [K]atherine was 6 months old."

On October 18, 2006, the court granted the requests of counsel for Larry and Catrina that the matter be continued. At the October 20 hearing, Larry testified by stipulation to the facts alleged in his section 388 petition. The stipulation also included the following: Larry married Catrina in January 2005. From May 5, 2005, to January 10, 2006, he was in custody. He had one visit with the children between January 10 and February 10, when he was returned to custody until October 9. While he was in custody, he did not have any visitation, but wrote to the children in care of the social worker. He wrote to three social workers, but only one responded. He communicated with her regularly and consistently. He wrote to the court three times about his relationship with the children. Larry also offered a Statement Regarding Paternity, which said "I believe I am the children's father and request that the court enter a judgment of paternity" and "I understand that . . . [i]f I am judged to be the father . . . , I will have the legal obligation to support the child[ren] . . . ."4

The supervising social worker testified that the foster parent said Alexander expressed a concern that Larry would stab Catrina. Alexander said that he wanted to get a knife and stab Larry, or get a gun and shoot him, or just "keep him away." After Catrina told Alexander, by telephone, that she was in jail, he asked his foster parents if they could get the key to the jail and let Catrina out, because he was concerned that Larry

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4 The Agency's counsel raised a hearsay objection, and the court received the Statement Regarding Paternity as a prior consistent statement.

would harm her. The supervising social worker explained to Alexander that Larry was in a different jail than Catrina and there was no need to worry. Both Alexander and Katherine referred to their foster father as "Daddy," and the supervising social worker did not believe they ever referred to Larry as "Daddy." They had not asked her about Larry during the three visits she supervised, nor, to her knowledge, had they asked Catrina about him. During one visit, Alexander refused Catrina's persistent attempts to get him to write or draw something for Larry. Regarding Larry, Alexander told the social worker, "I don't like him. I don't want to see him."

In denying Larry's section 388 petition, the juvenile court incorporated the argument of the Agency's counsel. She argued as follows. Larry had been out of the children's lives for 17 months. They did not know him as a father, two-year old Katherine would not even recognize him, and Alexander was scared of him.. This was not a section 388 issue and, in any case, Larry clearly had not made the prima facie case required for an evidentiary hearing. Family Code section 7611, subdivision (d) was enacted to recognize a man as a father when he acted as such. Here, Alexander and Katherine were removed because Catrina and Larry used drugs. Larry was already on parole and remained in custody for a substantial period, during which he had no contact with the children. When he was released, he had one visit before being reincarcerated one month later. He acted as a stepfather only from January to May 2005. Larry's testimony was not credible. Katherine was six months old in January 2005, and he

claimed to have begun living with the children when she was six months old, but also to have begun living with them in April 2004.<sup>5</sup>

Larry's section 388 petition did not specify an order or orders to be modified, nor did it specify any evidence that was new or circumstances that had changed. Thus, he did not make the prima facie showing of new evidence or changed circumstances required to trigger the right to a hearing on the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Furthermore, the petition was internally inconsistent, stating that Larry began living with the children April 2004 and when Katherine was 6 months old. Larry's testimony by stipulation included this inconsistency. His paternity questionnaires included the inconsistent statements that Alexander was born in 2002, Katherine was born in 2004, Larry married Catrina in 2005, and he was married to her when the children were born. At the outset of the case, Larry acknowledged that he was not the children's father, yet in his Statement Regarding Paternity he said "I believe I am the children's father . . . ."

"Paternity presumptions are driven . . . by the state's interest in the welfare of the child and the integrity of the family." (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209, citing *In re Nicholas H.* (2002) 28 Cal.4th 56, 65.) "The presumed father's commitment to the child is a key consideration." (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1210.) "In determining whether a man has 'receiv[ed] a child into his home and openly h[eld] out the child' as his own [citation], courts have looked to such factors as whether the man

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<sup>5</sup> Katherine was born in June 2004 and became six months old in December.



actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental." (*Id. at* p. 1211.)

Larry had the burden of proving, by a preponderance of the evidence, that he was entitled to presumed father status. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585.) There is substantial evidence supporting the conclusion that he was not so entitled. (*In re T.R., supra*, 132 Cal.App.4th 1212.)

Larry had previous child welfare referrals for neglect and domestic violence in connection with his own children. In January 2005, the month Catrina and Larry married, they accepted a voluntary contract with the Agency due to the dirty and unsanitary condition of their home and Catrina's past drug use. In April, there was a referral stating that Larry had attempted suicide by cutting his throat and wrist while he was supervising Alexander and Katherine.

There is no evidence in the record that Larry helped Catrina with prenatal care or pregnancy and birth expenses. Indeed, the only evidence that he was with Catrina before the latest birth (Katherine's) were his own contradictory statements. He took no legal action until quite some time after the dependency petitions were filed. The only evidence

that he acknowledged the children were his own statements, and there is no evidence regarding the number of people to whom he acknowledged them. Larry admitted that his only visit with the children between May 5, 2005 and October 9, 2006 was during the month he out of custody in early 2006. He apparently had no contact with the children between his October 9 release and the October 20 hearing. While he claimed to have written to the children in care of the social worker; he did not say how many times he wrote. Thus, at the time of the hearing, Larry had been out of the children's lives for 17 months, except for one visit approximately eight months earlier. Because Katherine was only two years four months old at the time of the hearing, it is extremely unlikely that she would even recognize him. It was clear that Alexander was scared of him. They viewed their foster father, not Larry, as their father.

Finally, Larry complains he did not receive the notice to which alleged fathers are entitled at the time of detention. (§ 316.2.)<sup>6</sup> At the outset of the case, Catrina named two

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<sup>6</sup> Section 316.2 states: "(a) At the detention hearing, or as soon thereafter as practicable, the court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers. The inquiry shall include at least all of the following, as the court deems appropriate: (1) Whether a judgment of paternity already exists. (2) Whether the mother was married or believed she was married at the time of conception of the child or at any time thereafter. (3) Whether the mother was cohabiting with a man at the time of conception or birth of the child. (4) Whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy. (5) Whether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a voluntary declaration of paternity. (6) Whether paternity tests have been administered and the results, if any. (7) Whether any man otherwise qualifies as a presumed father pursuant to Section 7611, or any other provision, of the Family Code. (b) If, after the court inquiry, one or more men are identified as an alleged father, each alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the

other men as the children's father. She said that she lived with a third man during her pregnancy with Katherine, who was born in June 2004. Catrina expressly stated Larry was not the children's father and Larry concurred. At the detention hearing, the court correctly noted that Larry did not qualify as a presumed father. (Fam. Code, § 7611.) Neither Catrina nor Larry claimed that he was a presumed father until more than three months after the jurisdictional and dispositional hearing. Notice to Larry pursuant to section 316.2 was not required.

The court did not abuse its discretion by denying Larry's section 388 petition (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522), it did not err by declining to accord him presumed father status, and there is no merit to Larry's contention that cumulative errors require reversal of the order denying his petition.<sup>7</sup>

### THE BENEFICIAL RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1) requires termination of parental rights upon clear and convincing evidence of adoptability, but an exception exists if "[t]he parents . . .

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child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice. . . . [¶] . . . [¶] (d) If a man appears in the dependency action and files an action under Section 7630 or 7631 of the Family Code, the court shall determine if he is the father. . . ."

<sup>7</sup> Larry cites the court's failure to grant him presumed father status at the September 6, 2005 hearing; his request for presumed father status and reunification services at the January 12, 2006 hearing; and the court's denial of his request to be ordered into SARMS at the January 19, 2006 hearing. At none of these hearings did the court have information that would have justified a presumed father finding or an order for services.

have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) The existence of a beneficial relationship is determined, in part, by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*Id.* at p. 576.)

Examining the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the finding that Catrina failed to meet her burden of showing regular visitation and contact and a beneficial relationship. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 576-577; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

At the outset of the case, Catrina visited the children regularly. From April to June 2006, she visited six times. In August and September, however, she failed to appear for five out of seven visits. She said the visits were too early. The social worker suggested the time be changed from 9:30 a.m. until 10:30 a.m., instead of 9:00 a.m. until

10:30 a.m., although this would mean Catrina would have one-half hour less with the children. Catrina agreed. She was supposed to call the social worker by 8:30 a.m. on the day of a visit to confirm that she would be there. She did not call on the date of the next scheduled visit, September 28, 2006, so the visit was cancelled. Catrina did not give the social worker a telephone number where she could be reached, and mail sent to the address she had given to the Agency was returned.

Catrina never progressed to unsupervised visitation. She rarely inquired whether the children were hungry or thirsty during visits, only once brought food, and never brought drinks. She sometimes ignored the children, even when they were engaged in potentially dangerous activities, and usually favored Katherine over Alexander. She commanded and berated Alexander, on one occasion reducing him to tears. She rarely gave him positive feedback and was inconsistent and ineffective in giving him direction. The children sometimes objected to leaving the foster home before visits, but showed no distress upon parting from Catrina when visits ended.

By the time of the hearing, Catrina still had not addressed her substance abuse problem. Alexander was four and one half years old and Katherine was two years four months old, and they had not lived with Catrina for one year five months. For seven months, they had lived with their prospective adoptive parents. They had quickly adjusted to this home, and thrived in the nurturing, consistent, and stable environment. Alexander and Katherine referred to their foster parents as "Mommy and Daddy."

The juvenile court did not err by failing to apply section 366.26, subdivision (c)(1)(A), or by failing to order a permanent plan of long-term foster care or guardianship.

DISPOSITION

Judgment affirmed.

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O'ROURKE, J.

WE CONCUR:

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NARES, Acting P. J.

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AARON, J.